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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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NO. 74-1435

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ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners

V.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.,

Respondents

* * *

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

* * *

BRIEF OF AMICI CURIAE

* * *

BRONSON C. LaFOLLETTE
Attorney General of Wisconsin
Department of Justice
Madison, Wisconsin 53702

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

DOUGLAS G. CAROOM
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711

ATTORNEYS FOR AMICI CURIAE

September, 1975

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BRIEF OF AMICI CURIAE

INTERESTS OF THE AMICI CURIAE

It is the interest of Amici Curiae, States of

Texas and Wisconsin, to seek a determination that federally owned or operated facilities are required by Section 313 of the Federal Water Pollution Control Act Amendments of 1972[1] to obtain, and to comply with the terms of state issued waste discharge permits.

Amicus, State of Wisconsin, has an EPA-approved state permit program. Under its Pollution Discharge Elimination Act of 1973[2], Wisconsin requires that any person discharging pollutants into the waters of the state obtain a discharge permit from the Wisconsin Department of Natural Resources. It is thus in precisely the same situation as California and Washington respecting its authority to issue permits to federal installations in the state.

Amicus, State of Texas, operates a permit system under the Texas Water Quality Act.[3] The State of Texas has not, as yet, been granted authority to administer the federal NPDES permit program. Texas has operated its own state permit program since 1967, well before passage of the 1972 Amendments to the Federal Water Pollution Control Act.

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[1] 86 Stat. 816, et. seq., 33 U.S.C. Sec. 1251, et. seq. (Supp. III, 1975).

[2] WISC. STAT. Sec. 147.01, et. seq. (1973).

[3] TEX. WATER CODE Sec. 21.001, et. seq. (1972).

The Texas Water Quality Act, similarly, prohibits the discharge of any wastes into the waters of the state except pursuant to a permit issued by the Texas Water Quality Board.

In granting permits to discharge pollutants, the states hold public hearings to receive comments from both the public and the discharger. Based upon such hearings, together with information submitted by the discharger concerning the type of wastes to be discharged and the existing and/or proposed treatment facilities, the administrative agency issues a permit that is tailored to the individual discharger. This permit requires the best practicable treatment of wastes, in light of existing technology, economic conditions, and the effect on the body of receiving water. Regulation of effluent quality and quantity by means of the permit system is the primary means of achieving high water quality for both states.

While neither state, at this time, is experiencing critical water pollution problems due to federal installations, the prospect of relying upon voluntary cooperation from such installations to protect the states' water quality and to obtain effluents that are the product of the application of the best available technology is a matter of serious concern.

ARGUMENT AND AUTHORITIES

A state permit program is clearly a "requirement respecting control and abatement of pollution" with which the Federal Government must comply under Section 313.

The Amici believe that the issue sub judice was correctly decided by the Ninth Circuit below, California v. EPA, 511 F.2d 963 (1975), and urge the Court to adopt the result reached in that case. While there is little room to improve upon the court of appeals' well-reasoned analysis of the provisions of the Federal Water Pollution Control Act, Texas and Wisconsin offer the following brief argument.

To discover whether Congress intended that federal instrumentalities should comply with state permit requirements, the plain and unambiguous language of the Federal Water Pollution Control Act must be considered. Caminetti v. United States, 242 U.S. 470 (1917). Section 313 of the Federal Water Pollution Control Act[4] plainly directs federal facilities to "comply with Federal, State. . .requirements respecting control and abatement of pollution to the same extent than any person is subject to such requirements. . . ." The permit programs of California and Washington are quite clearly within this statutory language.

The state permit programs are obviously "requirements" in the ordinary sense of the word. Webster's Third International Dictionary (1969) defines "requirement" as something "needed," "called for," or "demanded"; a "requisite or essential condition." The permit programs of California and Washington, like those of Texas and Wisconsin, are not only "demanded" in the legal sense by state statutes and regulations, they are "essential" to the states' efforts to achieve and maintain high water

[4] 33 U.S.C. Sec. 1323 (Supp. III, 1975).

quality. Petitioners' would have this Court depart from the ordinary meaning of "requirement" and define it to include only "effluent limitations," the phrase used in the Conference Committee Report on the 1972 Amendments to the Federal Water Pollution Control Act.[5] Such a departure is clearly unwarranted.

Had Congress intended that the Federal Government comply only with state effluent limitations or water quality standards, it would have said so. Congress, in fact, enacted the present language to replace a provision contained in 1970 Amendments that provided the precise limitation Petitioners now seek to impose, i.e., "Each federal agency. . . shall. . . insure compliance with applicable water quality standards. . . ."[6] Had Congress intended only compliance with "applicable water quality standards," it would not have modified that language. Similarly, had Congress intended to say only "effluent limitation" or "standard," it would have used those terms in their precise sense as it did in several other sections of the Act.[7] These two

[5] 1972 U.S. Code Cong. & Admin. News at 3812-13.

[6] Act of April 3, 1970, Pub. L. 91-224, Sec. 21(a), 84 Stat. 91,107.

[7] See, Sec. 301, 302, 303, 306, 307, 315, and 510, of the Federal Water Pollution Control Act Amendments of 1972 /33 U.S.C. Sec. 1311, 1312, 1313, 1316, 1317, 1325, and 1370/.

facts--rejection of language in the previous statute that required only federal compliance with state standards, and the failure to use the terms "effluent standards" or "effluent limitations," frequently employed elsewhere in the Act--evince an unequivocal Congressional intent to subject federal facilities to the same regulatory measures applicable to every other source of water pollution.

Moreover, legislative history of the Act shows a clear Congressional displeasure with water pollution abatement efforts of federal installations. As summarized by the report of the Senate Committee on Public Works:

> Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.[8]

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[8] 72 U.S. Code Cong. & Admin. News at 3733-34 (comments on Sec. 313 of the 1972 Amendments to the Federal Water Pollution Control Act).

Congress, in short, meant what it said -- the federal government shall be subject to the same water pollution requirements as everyone else, except where the President concludes that it is in the paramount national interest to exempt a federal facility from some specific requirement.

Petitioners attempt to impose a substantive-procedural distinction upon the requirements for federal facilities imposed by Congress. As previously discussed, such a distinction is supported by neither the legislative history nor specific provisions of the Act. Moreover, as noted by the court below, this distinction is, as a practical matter, unworkable. In the process of issuing permits, public hearings are held and information is gathered so that the discharge permit ultimately issued is tailored to the individual discharger's effluent, his waste water treatment system, and the body of receiving water. Without involvement in the administrative process that precedes permit issuance, the setting of precise, individually tailored effluent limitations is severely hampered. Nowhere is this effect more pronounced than in the issuance of compliance schedules. Petitioners admit that, even utilizing the substantive-procedural distinction,[9] the state may establish compliance schedules for federal facilities. An administrative process-- involving investigation of necessary waste treatment improvements, submission and review of engineering plans for those improvements, consideration of equipment and raw material availability, and establishment of specific deadlines for completion of

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[9] Petitioners' Brief at 17 & 20.

various phases of construction; together with promulgation of interim effluent limitations--is absolutely indispensable to the issuance of a compliance schedule. That situation, especially, points up the impracticality of petitioners' substantive-procedural distinction. Your Amici completely concur with the Fifth Circuit's conclusion that the attempted distinction is nothing more than a "semantical red herring."[10]

CONCLUSION

The States of Texas and Wisconsin urge this Court to uphold the decision of the Ninth Circuit Court of Civil Appeals. At stake is more than a mere "procedural" requirement. Without permits, and the accompanying administrative process, states will be essentially relegated to the status existing prior to enactment of the 1972 Amendments to the Federal Water Pollution Control Act, i.e., dependent upon voluntary cooperation from federal facilities to achieve necessary water pollution abatement. If the decision of the Ninth Circuit is reversed, and federal facilities are insulated from state permit requirements, the Federal Government, contrary to the wishes of Congress, will be effectively exempted from the national commitment to end water pollution.

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[10] Alabama v. Seeber, 502 F. 2d 1238, 1245 (5th Cir. 1974).

Respectfully submitted,

BRONSON C. LaFOLLETTE
Attorney General of
Wisconsin
Department of Justice
Madison, Wisconsin

JOHN L. HILL
Attorney General
of Texas

DAVID M. KENDALL
First Assistant
Attorney General

TROY C. WEBB
Assistant Attorney
General

DOUGLAS G. CAROOM
Assistant Attorney
General

Attorneys for Amici
Curiae

P.O. Box 12548,
Capitol Station
Austin, Texas 78711